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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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*In the Matter of*

Amendment of the Commission's  
Rules Regarding Installment Payment  
Financing for Personal Communications  
Services (PCS) Licenses

WT Docket No. 97-82

**COMMENTS OF NATIONAL TELECOM  
ON SECOND REPORT AND ORDER AND  
FURTHER NOTICE OF PROPOSED RULE MAKING**

Jack E. Robinson  
President  
NATIONAL TELECOM PCS, INC.  
Clearwater House  
2187 Atlantic Street  
Stamford, CT 06902  
(203) 425-4100

Dated: October 28, 1997

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## **I. INTRODUCTION**

National Telecom PCS, Inc. ("NatTel"), one of the first designated entities (and the first truly minority-owned designated entity) formed to participate in the C block PCS auction, hereby respectfully comments on the *Second Report and Order* ("Report") and *Further Notice of Proposed Rule Making* ("Notice") released by the Commission on October 16, 1997.

While the Commission should be lauded for navigating safely (if somewhat turbulently) through the political, financial and regulatory shoals of the C block problem, the Commission should take additional steps to ensure that the unscrupulous do not misuse the bankruptcy laws to keep important public assets — PCS licenses — from the use and benefit of the American people.

## **II. THE COMMISSION SHOULD AMEND ITS RULES TO PRECLUDE BANKRUPTCY FILINGS FROM STIFLING COMPETITION AND DEPRIVING THE AMERICAN PEOPLE OF PROMISED AUCTION REVENUES AND NEW WIRELESS SERVICES**

Unless the Commission takes action now, come January 15, 1998 (the "Election Date"), the Commission will very likely be forced to deal with a host of bankruptcies from big and small C block players alike who, for whatever reason, do not like any of the four restructuring options currently available to them.<sup>1</sup>

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<sup>1</sup> Licensees who do not choose any of the four options will not wait until the first payment is due (March 31, 1998) to declare bankruptcy because the Commission will deem a failure to choose an option by the Election Date as a waiver of any and all financial accommodations. See *Report* at ¶ 76. Thus, C block bankruptcy filings are likely to occur **before** the Election Date (and probably before the end of this year) so as to stave off the consequences of failing to act by the Election Date since the automatic stay of § 362(a)(1) of the Bankruptcy Code will moot the effectiveness of the Election Date if a bankruptcy petition is filed before then.

The ongoing bankruptcy of Pocket Communications, Inc. ("Pocket") is just the tip of the iceberg. It is indeed possible that, without bold Commission action now, most of the C block licenses could end up mired in bankruptcy litigation before the end of the year. Given the current state of the Pocket bankruptcy, such a result would be an unmitigated disaster not only for the Commission but for the American people, who were promised auction revenues and the swift introduction of new wireless services but instead have to date received nothing but delays, intense lobbying and political arm-twisting, no revenues, no new services and added costs and risks for the American Treasury.

For example, although the Commission bent over backwards to allow Pocket to "prime" the license debt owed the Commission to the tune of \$4.8 million so that Pocket could acquire debtor-in-possession financing to stay alive in bankruptcy, how did Pocket repay this extremely charitable gesture? By threatening to run to the bankruptcy court and ask a judge to rule that the licenses for which the American people thought they would receive \$1.43 billion will only get them \$300 million.

The Commission then attempted this past summer to get Congress to amend the Bankruptcy Code so that licenses would not be considered property of the bankruptcy estate and could be withdrawn by the Commission immediately if a licensee declared bankruptcy. But, as Chairman Hundt said in his statement,

"[p]owerful lobbying forces defeated [those] efforts . . . [and] no such legislation is likely this year."<sup>2</sup>

This means that if the Commission is going to prevent other Pockets from happening in the next 60 days, and save the C block both from oblivion and itself, the Commission must take matters into its own hands now, before it is too late.

NatTel proposes a relatively simple solution to this seemingly intractable problem. Instead of going to Congress with hat in hand, the Commission need only look to the escape hatch that Congress has already provided the Commission (and other governmental entities) in the Bankruptcy Code.

**A. Section 362(b)(4) Exemption from the Automatic Stay**

Although the automatic stay in bankruptcy can repel actions by "all entities," including governments, some governmental actions penetrate this seemingly impregnable barrier. Pursuant to 11 U.S.C. § 362(b), the filing of a bankruptcy petition does not operate as a stay:

(4) . . . of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . <sup>3</sup>

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<sup>2</sup> See Report, Affirming and Dissenting Separate Statement of Chairman Reed E. Hundt, at p. 3 (the "Chairman's Statement").

<sup>3</sup> 11 U.S.C. § 362(b)(4).

As the legislative history of the Bankruptcy Code explains, "[t]hus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay."<sup>4</sup>

In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*,<sup>5</sup> the debtor contended that an investigation conducted by the Federal Reserve was beyond its regulatory powers, and thus was not an exercise of governmental powers that could be excepted from the automatic stay provisions of the Bankruptcy Code. The Supreme Court rejected that argument:

MC Corp contends that in order for § 362(b)(4) to obtain, a court must first determine whether the proposed exercise of police or regulatory power is legitimate and that, therefore, in this litigation the lower courts did have the authority to examine the legitimacy of the Board's actions and to enjoin those actions. We disagree. MC Corp's broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts. We therefore reject MC Corp's reading of § 362(b)(4).<sup>6</sup>

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<sup>4</sup> S.Rep. No. 95-989, at 52 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5838.

<sup>5</sup> 502 U.S. 32 (1991).

<sup>6</sup> *Id.* at 40.

**B. Automatic Financial Unfitness Should Attach to Bankruptcy**

Since section 362(b)(4) of the Bankruptcy Code provides that actions within the regulatory or police power of government agencies are **not** stayed during bankruptcy, all the Commission needs to do is amend its rules now to state that any licensee who declares bankruptcy shall automatically be found to be financially unfit to be a licensee. As a consequence, its licenses will be automatically revoked and redistributed upon the filing of a bankruptcy petition.

This the Commission can do through its own rulemaking authority, and does not need to gain the approval of Congress or the courts, since section 362(b)(4) of the Bankruptcy Code already allows the Commission to take such action.

By having an automatic finding of financial unfitness attach to a bankruptcy filing, the Commission can guarantee, simply with a stroke of its own pen, that there will not be anymore C block bankruptcies!

The Commission should also make such a finding retroactively, so as to cover any licensee which was in bankruptcy on September 25, 1997, the date the *Report* was adopted. NatTel's proposed rule could read as follows:

**Automatic Financial Unfitness.** Any licensee which either files (or has filed against it and which is not dismissed by a court of competent jurisdiction within sixty days thereafter) a petition under 11 U.S.C. §§ 101 *et seq.*, or has such a petition pending on or after September 25, 1997, shall automatically be deemed to be financially unfit to be a licensee and the Commission shall immediately revoke and cancel any and all licenses held by such licensee pursuant to the Commission's police and regulatory power.

Such a new rule will guarantee that the Commission can rescind and reacquire any C block licenses currently in bankruptcy or placed into bankruptcy in the future (although the practical effect of such a rule is that it will effectively prevent any new C block bankruptcies). The Commission currently has the legal authority to implement such a rule. It should do so now.<sup>7</sup>

Some commenters in this proceeding might object to such a use of the “police and regulatory power” exception to the automatic stay advocated by NatTel. Such commenters would likely argue that taking away PCS licenses from a debtor constitutes destroying property of the estate which the Bankruptcy Code prohibits. However, that argument has been considered and rejected by several courts, most recently by the Sixth Circuit in the *Javens* case.<sup>8</sup>

In *Javens*, the Sixth Circuit concluded that “the (b)(4) and (b)(5) exceptions [to the automatic stay] are not intended to be limited to nondestructive exercises of governmental power. Many governmental actions clearly within the police or regulatory power destroy some or all of the value that property has to an estate. The limitation would too often void an exception Congress wrote into the law.”<sup>9</sup>

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<sup>7</sup> Although NatTel recently petitioned Pocket’s bankruptcy court to take over Pocket’s licenses and resume Pocket’s original installment payments, adoption of the suggested rule would not affect NatTel’s interest in Pocket’s licenses. The Commission could simply revoke the licenses and transfer them to NatTel subject to the existing loan terms. Given NatTel’s pending application for review of its petition to deny all of Pocket’s licenses, this would be an administratively efficient solution to the “Pocket problem.”

<sup>8</sup> *In re Javens*, 107 F.3d 359 (6th Cir. 1997).

<sup>9</sup> *Id.* at 370-71.

As stated by the Ninth Circuit, the policy behind section 362(b)(4) of the Bankruptcy Code is “to prevent the bankruptcy court from becoming a haven for wrongdoers.”<sup>10</sup> This same policy should drive the Commission’s actions in this proceeding, so as to prevent those who would subvert public policy by tying PCS licenses up in bankruptcy proceedings from doing so. Particularly where the Commission has exclusive jurisdiction under its police and regulatory power “to grant or deny the license on the basis of the situation of the applicant.”<sup>11</sup>

### **III. REAUCTION ELIGIBILITY SHOULD NOT BE UNDULY RESTRICTED**

In the *Notice*, the Commission seeks comment on whether the Commission “should restrict participation in the reauction to entities that have not defaulted on any FCC payments.”<sup>12</sup>

NatTel believes that maximum participation in the C block reauction (by qualified designated entities) is in the best interest of the American taxpayer. However, it is equally important that the Commission receive any and all monies due it from prior auctions.

Thus, NatTel suggests that entities who may have defaulted on prior Commission payments **should** be allowed to participate in the C block reauction; **provided, however**, that such entities make good on any and all outstanding indebtedness to the Commission either prior to or at the time that their reauction

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<sup>10</sup> *C.F.T.C. v. Co Petro Marketing*, 700 F.2d 1279, 1283 (9th Cir. 1983).

<sup>11</sup> *Regents of Univ. System of Ga. v. Carroll*, 338 U.S. 586, 602 (1950).

<sup>12</sup> *Notice* at ¶ 84.



upfront payment is due. However, this proviso should **not** apply to entities whose alleged payment obligations to the Commission are, at the time the reauction upfront payment is due, the subject of an application for review, petition for reconsideration, or judicial appeal.

Such a proviso would maximize auction participation while at the same time ensure that the Commission receives payment of outstanding balances from entities who are, at the time of the reauction, finally deemed to be indebted to the Commission.

#### **IV. INSTALLMENT PAYMENTS SHOULD BE OFFERED**

At the risk of being accused of suggesting that the Commission fall into the “fool me once, shame on you; fool me twice, shame on me” school of thought on this issue, NatTel believes that the Commission should not necessarily throw the baby out with the bath water regarding C block reauction installment payments.

The fact of the matter is that there is nothing wrong with the Commission’s C block installment payment program. The program itself is fine. It’s just that the bidders overvalued the benefits of the installment payment plan. Now that the “bloom is off the rose” in terms of wireless financing, the C block community is unlikely to repeat its bidding mistakes in the reauction. And even if it were to do so, and there are numerous defaults soon after the reauction, adoption of NatTel’s proposed bankruptcy rule will ensure that licenses can be quickly revoked and, if necessary, redistributed for a third time.

There is another, more basic, reason why installment payments should be offered in the reauction. If there is no installment payment plan, then the C block will have some licenses with government financing and some without. It is evident that Wall Street is having enough of a difficult time valuing and financing C block players. The Commission should not compound the problem by having C block licenses out there with substantially different financial characteristics.

## **V. CONCLUSION**

In November 1862, when Federal forces suddenly found themselves surrounded by Confederates led by Leonidas Polk at Belmont, Missouri, General U.S. Grant turned to an aide and declared “we’ll cut our way out.” And he did.

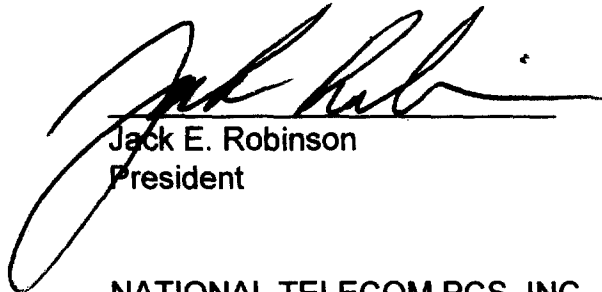
It’s now 135 years later and, like Grant, the Commission must cut its way out of the impending C block bankruptcy morass. It can do so by adopting the rule suggested above, which will ensure that bankruptcy law is not misused to the detriment of the American taxpayer.<sup>13</sup>

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<sup>13</sup> By adopting the rule described above, the Commission would also be able to avoid having to “compromise the Pocket litigation.” See Chairman’s Statement at p. 3. Any such “compromise” cannot be good news to the American taxpayer.

Respectfully submitted,

NATIONAL TELECOM PCS, INC.



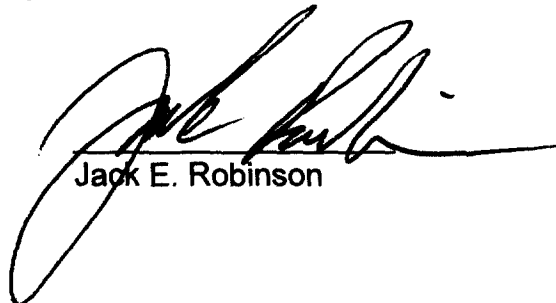
Jack E. Robinson  
President

NATIONAL TELECOM PCS, INC.  
Clearwater House  
2187 Atlantic Street  
Stamford, CT 06902  
(203) 425-4100

Dated: October 28, 1997

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and accurate original plus ten copies thereof were served on the Secretary on this date by first class mail, postage prepaid. A courtesy copy was served on Mr. Mark Bollinger of the Wireless Telecommunications Bureau by like means.



Jack E. Robinson